2013 IL App (3d) 110913-U

Order filed December 20, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-11-0913
v.	)	Circuit No. 09-CF-1561
	)	
MARY VETOR,	)	Honorable Amy Bertani-Tomczak,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: Where one attaches herself to a group bent on illegal acts which are dangerous or homicidal in character, or which will probably or necessarily require the use of force and violence that could result in the taking of life unlawfully, she becomes accountable for any wrongdoings committed by other members of the group in furtherance of the common purpose, or as a natural or probable consequence thereof even though she did not actively participate in the overt act itself. Whether an expert is qualified to testify is not dependent on whether she is a member of the same specialty or subspecialty but, rather, whether the allegations of negligence concern matters within her knowledge and observation. It is not our duty to reweigh the factors involved in a circuit court's sentencing decision.

¶ 2 After a jury trial, defendant, Mary Vetor, was convicted of felony murder (720 ILCS 5/9-1(a)(3) (West 2010)), attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)), home invasion (720 ILCS 5/12-11(a)(2) (West 2010)) and armed robbery (720 ILCS 5/18-1, 18-2(a)(2) (West 2010)) under a theory of accomplice liability. We affirm defendant's convictions for felony murder, attempt and home invasion. We vacate defendant's armed robbery conviction because it was the predicate offense for her felony murder conviction.

¶ 3 FACTS

¶ 4 The following evidence was adduced at defendant's trial. Defendant stated, in a video-taped interview to police, that she, Jason Orasco, Matthew Edwards and Ashley Hill were at her residence discussing that they all needed money. The group discussed robbing a drug dealer (Joshua Terdic) who allegedly owed Orasco money. Defendant told Edwards or Orasco to take her revolver for protection because Terdic was a drug dealer. All four of them agreed to bringing the gun for protection.

¶ 5 All four individuals then entered defendant's truck and defendant drove to Channahon, where Terdic lived. Defendant parked near Terdic's residence and Orasco and Edwards exited the truck. Hill remained in the truck with defendant. Defendant noted that Orasco left the truck with a baseball bat and Edwards with the revolver. While parked, a Channahon police officer approached defendant's truck. Defendant received a citation for possession of cannabis from the officer.

¶ 6 After her encounter with the officer, defendant left the scene with Hill and drove back to her residence. Hill stayed with defendant at her residence. When defendant arrived home, defendant's mother inquired as to the whereabouts of Orasco and Edwards. Defendant did not

give her mother any details because she did not want to tell her mother about the robbery. Defendant drove her mother to work, then returned home and went to sleep.

¶ 7 Defendant woke up and answered text messages from Orasco and Edwards. Defendant sent Orasco and Edwards a text telling them that she was leaving to pick them up in Channahon. Orasco and Edwards told defendant to pick them up at a friend's cabin in the surrounding area and to bring her car, as opposed to her truck, because there were police all over the area. Defendant and Hill then left in defendant's car.

¶ 8 Defendant arrived at the cabin and Orasco and Edwards her car. Orasco and Edwards told defendant and Hill about shooting Terdic and his girlfriend (Lauren Vasilakis) in the head. The two men gave defendant $100 from the money they stole from Terdic to pay her ticket for possession of cannabis. Defendant smoked some of the cannabis taken from Terdic's apartment.

¶ 9 Defendant drove Hill, Orasco and Edwards back to defendant's residence. All four stayed at the residence and watched the news. They cheered when they heard the story of the armed robbery on the television news, and stayed at the residence talking about the armed robbery. The defendant then fell asleep for approximately two hours. She woke up and left to pick up her mother from work. Upon her return, defendant relaxed at the residence with Hill, Orasco and Edwards until the police showed up looking for Orasco.

¶ 10 Hill testified at defendant's trial on behalf of the State in exchange for an agreed sentence of eleven years' imprisonment. Hill testified she was at defendant's residence with defendant, Orasco and Edwards. The group discussed that Edwards and Orasco "were going to rob someone." Specifically, Edwards and Orasco were going to wait outside Terdic's apartment in Channahon and "run his pockets." Edwards and defendant discussed that they may need a gun

for protection so defendant gave Edwards her gun. Hill stated that both she and defendant knew Orasco and Edwards were going to rob Terdic.

¶ 11 The four individuals got into defendant's truck and drove to Channahon. Orasco gave defendant directions because defendant did not know where she was going. When they arrived the men exited the truck. Hill stated on direct examination that the plan was to wait outside of Terdic's apartment, but go inside if he did not come out. On cross-examination, however, Hill stated that there was never a specific conversation about going inside Terdic's house. Hill later reaffirmed on redirect examination that there was a plan to enter the home if Terdic did not come outside.

¶ 12 Hill testified that she and defendant maintained communication with Orasco and Edwards via her cell phone. Hill gave them her cell phone because it was a pre-paid phone and Orasco and Edwards believed it to be untraceable. Within ten minutes of parking the truck, a police officer approached defendant's truck and cited defendant for possession of cannabis. Hill and defendant then decided to leave, and Hill initially stated that they did not talk to Edwards or Orasco prior to leaving. On cross-examination, however, she indicated that she and defendant decided to leave on their own and defendant asked her to get a hold of Orasco and Edwards and inform them that they were leaving. Hill tried to text the men something to the effect of "we're done," we're going home," or "we're leaving." Hill stated that she and defendant would have continued waiting for Orasco and Edwards if the police officer had not made contact with them. Hill testified they decided to leave in order to avoid suspicion and to get high.

¶ 13 Hill stated that defendant woke her up the next morning and told her that they had to go pick up Orasco and Edwards. Upon arriving at the cabin, the group sorted through the items

taken during the robbery. On the way back to defendant's residence, Edwards informed defendant and Hill of the events that had transpired in the apartment. Defendant became upset when she learned that the men had left the baseball bat at the apartment. Upon returning to defendant's residence, defendant, Orasco and Edwards split the money taken during the robbery. The group got excited when they saw coverage of the incident on the television. They then discussed fleeing Illinois due to concerns they might be caught by the police. The police arrived later that afternoon and transported all of them to the police station.

¶ 14 Defendant testified on her own behalf. She testified that she, Hill, Orasco and Edwards decided that they would get money from Terdic by going to his apartment and waiting for him to come outside when he left early that morning for his construction job. Defendant was not supposed to do anything but drive all four of them to the apartment in Channahon so that Orasco could get his money from Terdic. Defendant stated that Edwards took defendant's gun from the house because Edwards thought he might need it for protection.

¶ 15 Defendant testified that after she was cited by the police officer, she yelled "F this – we're leaving" out the window of the truck to let Orasco and Edwards know that she wanted no part of anything and she was heading home. After leaving Channahon and stopping at McDonalds, defendant and Hill returned home. The next morning, defendant drove her car, not her truck, to pick up Orasco and Edwards at the cabin. When she got there, Orasco and Edwards were hiding in the woods. Edwards came out with a duffel bag and defendant got out of the car to open up the trunk for him. They smoked some of the cannabis that Orasco and Edwards took from Terdic's apartment. On the ride home, Orasco and Edwards divulged details of the robbery. Defendant initially thought they were kidding about shooting Terdic and Terdic's girlfriend.

¶ 16 Defendant admitted that upon returning home, Orasco and Edwards gave her some of the money they stole from Terdic. Defendant also admitted initially being excited when she saw the a reporting of the incident on the news. Defendant yelled "Will County" because that is where she is from and she was rooting for Will County. However, she became upset when she realized that Edwards and Orasco had actually shot two people.

¶ 17 When the police arrived at defendant's residence, she initially told the officers that she had just gotten home from dropping her mother off at work and was not sure who was in her house. Orasco eventually appeared and was arrested. Defendant, Hill and Edwards were transported to the station and agreed to cooperate with the investigation.

¶ 18 Lauren Vasilakis, Terdic's girlfriend, testified as to what occurred inside Tedric's apartment on July 7, 2009. That morning around 5 or 6 a.m., Vasilakis was awakened by an arm around her neck pulling her up and out of bed. She was pressed against the bedroom wall by a masked assailant. She saw her boyfriend (Tedric) being held by an unmasked man who was very young with a shaved head and tanned skin. The man held a small revolver in his hand. The men demanded money and told them that they both knew Vasilakis and Tedric. Tedric explained that he had money in a blue Huggies container and also offered video games and jewelry. When the masked assailant holding Vasilakis spoke, she instantly recognized him as Orasco, because she had been close friends with his sister for ten years.

¶ 19 The men instructed Vasilakis and Terdic to lay flat on the bed and put pillows over their heads. Terdic would not cooperate, so the masked man hit him in the leg with a baseball bat. Vasilakis and Terdic sat on the bed for 30 to 45 minutes while the men conversed with each other, deciding what to do. Vasilakis heard Orasco say that he had killed his own sister and had

no remorse. Vasilakis suggested that the men tie them up with rope so that they could not escape to call police. After her wrists and ankles were tied together, Orasco tried to suffocate her in a "sleeper hold." She was in and out of consciousness as the men placed a pillow over her head. She felt a weight on the bed as if someone were kneeling near Terdic and heard a gunshot shortly thereafter. Then she felt someone kneeling over her with a gun pressed against her head through the pillow. She heard two clicks and felt wetness and her ear ringing. A bullet hit her behind her left ear. She played dead and waited for the men to leave.

¶ 20 After the men left, Vasilakis tried to talk to Terdic but he was unresponsive, throwing up and bleeding from his ear. She freed herself from the ropes and ran to a neighbor's apartment to call the police. When officers arrived at the scene at around 6:30 a.m., shortly after the shooting, they looked for suspects but did not find any. They also did not locate any suspicious vehicles. Vasilakis was transported to the hospital and treated for a gunshot wound to the head and neck.

¶ 21 Vasilakis had smoked cannabis prior to the incident. She does not know defendant and was positive there were only two assailants in her home that morning. She identified Orasco and Edwards as the two assailants, as well as many of the items stolen or used in the commission of the offense. The items included: the baseball bat and gun used in the offense, a money clip, a Playstation video game console, the mask and gloves that Orasco wore, and the duffel bag the men used. These items were admitted into evidence.

¶ 22 Terdic died on July 17, 2009. Because he did not die immediately, the cause of death was an issue defendant wanted to litigate. Prior to trial, defendant gave the State notice that she intended to call Dr. William Swann to testify that Terdic's death was the result of deficient medical care. The State filed a motion to bar the testimony, claiming that the testimony would

not absolve defendant of liability because it did not rise to the level of gross negligence or malpractice. Though the motion was addressed immediately prior to the start of trial, the circuit court decided to withhold ruling on the motion until after it heard the proposed testimony *in camera*.

¶ 23 During trial, Dr. Kevin Jackson testified that he was the neurosurgeon on call when Terdic arrived at the hospital at 7:00 a.m. on July 7, 2009. Terdic was awake though lethargic, combative but speaking, and had stable vital signs. Dr. Jackson testified that an initial CT scan showed no significant swelling. Thus, Dr. Jackson delayed performing surgery on Terdic until approximately 22 hours later, when Terdic had become comatose and he determined that Terdic had a hematoma. During surgery, Jackson removed a bullet from the right hemisphere of Terdic's brain. Terdic regained consciousness after the surgery. On July 14, 2009, Dr. Jackson assisted at a second surgery that was necessary to repair Terdic's weakened blood vessels. Dr. Jackson admitted that swelling is a common secondary complication of a gunshot wound to the head, and it is important to deal with such issues as soon as they are identified.

¶ 24 After the testimony of Dr. Jackson, Dr. Swann testified *in camera* that he had been an emergency room physician for almost thirty years. He estimated that during his career he had treated approximately ten gun shot wound patients. He stated that "[n]one of them *** [had] really good outcomes." Dr. Swann testified that he reviewed Terdic's medical records and opined that Terdic was stable and had a 5% likelihood of dying when he arrived at the hospital. The initial doctors that cared for him did "a good job" and he was quickly seen by a neurosurgeon (Dr. Jackson), who deferred urgent surgery. Dr. Swann also opined that the decision to operate approximately 22 hours after Terdic's arrival at the hospital increased his

probability of dying to 20%. Dr. Swann also opined that Dr. Jackson's assessment that there was no swelling on the initial CT scan was inaccurate.

¶ 25 After hearing testimony and argument, the circuit court denied defendant's request to present Dr. Swann's testimony to the jury. Specifically, the court found that Dr. Swann was not a neurosurgeon and that his testimony did not rise to the level of gross negligence or intentional malpractice.

¶ 26 Later in the trial, Dr. John Scott was called to testify as an expert in forensic pathology in place of the medical examiner who had performed Terdic's autopsy and who had died prior to trial. After reviewing the autopsy report and photos, as well as the medical records, Dr. Scott concluded that Terdic died from brain swelling due to a gunshot wound to the head. The deceased medical examiner had described the cause of death as "complications from a gunshot wound," which meant that Terdic did not die immediately – there was medical intervention and the process of dying was prolonged. He indicated that normally brain swelling would occur immediately, and that while the injury occurred on the morning of July 7, 2009, the first surgery was not performed until July 8, 2009, approximately 22 hours later.

¶ 27 After the close of evidence, the jury was given an instruction regarding withdrawal. During deliberations, the jury sent a written note stating:

> "Question – define furtherance in layman's terms for jury –
>
> If defendant shared in the planning for one event, is the defendant responsible for all events that followed or ensued? Is this considered furtherance?"

With the agreement of all parties, the court responded: "You have been instructed as to the law

that applies in the case. Please re-read your jury instructions."

¶ 28 Ultimately, the jury found defendant guilty of felony murder, attempt (first degree murder), home invasion and armed robbery under a theory of accomplice liability. Defendant faced a minimum sentence of 56 years' imprisonment. The circuit court sentenced her to a total of 61 years' imprisonment. Specifically, the court sentenced her to 36 years for Terdic's murder, 25 years for the attempted murder of Vasilakis, 10 years for home invasion and 10 years for armed robbery.

¶ 29 ANALYSIS

¶ 30 Defendant first contends that the evidence at trial was insufficient to establish beyond a reasonable doubt that she was accountable for the crimes of felony murder, home invasion and attempt (first degree murder). Specifically, defendant argues that because the group never discussed entering Terdic's apartment or shooting him or Vasilakis, she cannot be held accountable for the independent actions of Orasco and Edwards. Stated another way, defendant asserts that the evidence at trial did not establish that she aided or abetted Orasco and Edwards in home invasion, murder or attempt.

¶ 31 As to the underlying crime, armed robbery, defendant confusingly vacillates between two positions: (1) acknowledging that she agreed to aid and abet Orasco and Edwards in committing the offense of armed robbery as defined in the Code, and (2) refuting accountability because she merely agreed to help Orasco "get his money back" from Terdic without any knowledge that Orasco and Edwards were actually going to use robbery as the method to get the money back. Thus, in addition to analyzing defendant's felony murder, home invasion and attempt convictions, we also examine whether the evidence was sufficient to hold defendant accountable

for armed robbery.

¶ 32 When the sufficiency of the evidence is challenged, a criminal conviction will not be set aside unless the evidence, when viewed in the light most favorable to the prosecution, is so improbable or unsatisfactory that a rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt. *People v. Gilliam*, 172 Ill. 2d 484, 515 (1996). The reviewing court may not retry the defendant. *People v. Rivera*, 166 Ill. 2d 279, 287 (1995). The trier of fact determines the credibility of the witnesses, the weight given to their testimony, and the reasonable inferences drawn from the evidence. *People v. Enis*, 163 Ill. 2d 367, 393 (1994).

¶ 33 We begin with a review of the principles of accountability. "Accountability is not a crime in and of itself but, rather, a mechanism through which a criminal conviction may result." *People v. Rodriguez*, 229 Ill. 2d 285, 289 (2008) quoting *People v. Pollock*, 202 Ill. 2d 189, 210 (2002). Section 5-2© of the Criminal Code of 1961 (the Code) provides:

> "A person is legally accountable for the conduct of another when "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense.
>
> When 2 or more persons engage in a common criminal design or agreement, any acts in the furtherance of that common design committed by one party are considered to be the acts of all parties to the common design or agreement and all are equally

responsible for the consequences of those further acts." 720 ILCS 5/5-2© (West 2010).

¶ 34 The supreme court in *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995) explained some of the factors one looks to when confronted with an allegation of accountability under section 5-2©.

> "Mere presence of a defendant at the scene of a crime does not render one accountable for the offense. [Citations.] Moreover, presence at the scene plus knowledge that a crime was being committed, without more, is also insufficient to establish accountability. [Citation.] Nevertheless, active participation has never been a requirement for the imposition of criminal guilt under an accountability theory. [Citation.] One may aid and abet without actively participating in the overt act. [Citation.]
>
> A defendant may be deemed accountable for acts performed by another if defendant shared the criminal intent of the principal, or if there was a common criminal plan or purpose. [Citations.] Words of agreement are not necessary to establish a common purpose to commit a crime. The common design can be inferred from the circumstances surrounding the perpetration of the unlawful conduct. [Citations.] Proof that defendant was present during the perpetration of the offense, that he maintained a close affiliation with his companions after the commission of the crime, and that he failed to report the crime are all factors that the trier of

> fact may consider in determining the defendant's legal accountability. [Citation.] Defendant's flight from the scene may also be considered in determining whether defendant is accountable. [Citation.] Evidence that defendant voluntarily attached himself to a group bent on illegal acts with knowledge of its design also supports an inference that he shared the common purpose and will sustain his conviction for an offense committed by another. [Citation.]" *People v. Taylor*, 164 Ill. 2d 131, 140-41 (1995).

¶ 35 After reviewing the evidence in the light most favorable to the State, we find that there was sufficient evidence for a rational trier of fact to find defendant guilty of the armed robbery of Terdic under an accountability theory. A person commits armed robbery when he or she commits robbery while armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2010). A person commits robbery when he takes property from the person or presence of another by the use of force or threatening the imminent use of force. 720 ILCS 5/18-1(a) (West 2010).

¶ 36 Defendant admitted in her video-taped interview to police, that she, along with Orasco, Edwards and Hill discussed robbing Terdic because they all needed money. Defendant knew Orasco and Edwards were going to rob Terdic. Defendant told Orasco and Edwards to take her revolver for protection. Hill's testimony corroborated this version of events. Upon the conclusion of the discussion, defendant drove Hill, Orasco and Edwards to Terdic's apartment. Orasco and Edwards entered Terdic's apartment armed with defendant's revolver. Vasilakis testified that she was sleeping in the apartment when Orasco and Edwards robbed her and Terdic

with a revolver and a baseball bat. Vasilakis further testified that she heard gunshots shortly after Orasco and Edwards placed a pillow over both her head and Terdic's head. Both Terdic and Vasilakis suffered gunshot wounds to the head. Dr. Scott testified that Terdic died from brain swelling due to the gunshot wound to the head.

¶ 37 The morning after the armed robbery, defendant picked Orasco and Edwards up in her car, as opposed to her truck, so as to thwart police identification. Defendant was upset that Orasco and Edwards left the bat at Terdic's apartment. Orasco and Edwards gave defendant money and cannabis, both of which were taken by force from Terdic. Defendant remained in close contact with Orasco and Edwards after the armed robbery. At no time did she attempt to alert the police or warn the victims or otherwise attempt to prevent the execution of the group's plan. Defendant also did not contact the police after Orasco and Edwards told her of the home invasion and the shootings. Instead, she cheered when witnessing the incident on the news and also discussed fleeing Illinois with the others due to fear of getting caught by the police.

¶ 38 Under all those circumstances, it was reasonable for the trier of fact to conclude that defendant subscribed to an unlawful venture involving violence and a firearm (armed robbery) which, as a natural consequence, resulted in the home invasion of Terdic's apartment, the death of Terdic and the wounding/attempted murder of Vasilakis. See *People v. Flynn*, 2012 IL App (1st) 103687 ¶ 25. Defendant was, therefore, in addition to being guilty of the armed robbery, also guilty of the felony murder of Terdic, the home invasion of Terdic's apartment and the attempted murder of Vasilakis on a theory of accountability. See *Flynn*, 2012 IL App (1st) 103687 ¶ 25.

¶ 39 Contrary to defendant's assertion on appeal, it is inconsequential whether she and the

others specifically discussed entering Terdic's apartment to carry out the robbery or shooting Terdic and/or Vasilakis. See *People v. Kessler*, 57 Ill. 2d 493, 498-99 (1974). "Where one attaches himself to a group bent on illegal acts which are dangerous or homicidal in character, or which will probably or necessarily require the use of force and violence that could result in the taking of life unlawfully, he becomes accountable for any wrongdoings committed by other members of the group in furtherance of the common purpose, or as a natural or probable consequence thereof even though he did not actively participate in the overt act itself." *People v. Morgan*, 39 Ill. App. 3d 588 (1976).

¶ 40 In *Kessler*, the defendant waited in an automobile outside a tavern while his two companions entered into a building to commit burglary. While inside, one of the burglars shot and wounded the tavern owner and one of them fired a shot at a police officer. Defendant was found guilty of burglary and attempted murder. The supreme court held that the record showed a common design to commit a robbery or burglary. *Kessler*, 57 Ill. 2d at 498. In that case, the defendant "sat in on the plan" with two other individuals and led those individuals to the tavern. *Kessler*, 57 Ill. 2d at 498. The burglary was the offense that the three men had jointly planned and were jointly committing, which resulted in attempted murder. *Kessler*, 57 Ill. 2d at 499. Therefore, the court held that each was legally accountable for the conduct of the other in connection therewith. *Kessler*, 57 Ill. 2d at 499.

¶ 41 The dissent in *Flynn* raised the same argument defendant now presents on appeal -- a defendant cannot be held guilty of crimes she did not expressly discuss with his/her accomplices. Citing to *Kessler*, the majority rejected this argument. *Flynn*, 2012 IL App (1st) 103687 ¶ 30. Specifically, the majority stated:

> "[T]he dissent would construe the accountability statute to mean that when a defendant and his companions have agreed to engage in a criminal act, and a companion—during the commission of the agreed-upon criminal act—commits another criminal act in furtherance of the agreed-upon criminal act, the defendant cannot be held accountable for his companion's additional criminal act unless the defendant had agreed to that additional action. The dissent's construction of the accountability statute, however, overlooks our supreme court's interpretation of that statute. Specifically, *** [the *Kessler*] court has held that the accountability statute has been interpreted as meaning that " 'where one aids another in the planning or commission of an offense, he is legally accountable for the *conduct* of the person he aids; and that the word "*conduct*" *encompasses any criminal act* done in furtherance of the planned and intended act.' " (Emphasis in original.) [Citations.] *Flynn*, 2012 IL App (1st) 103687 ¶ 30

¶ 42 The reasoning developed by the *Kessler* court and reflected in the *Flynn* and *Morgan* decisions is controlling here. The evidence, taken in the light most favorable to the State, supports the jury's finding that defendant agreed to aid and abet Orasco and Edwards in robbing Terdic with a firearm. The resulting felony murder, home invasion and attempt were all acts done in the furtherance of the agreed upon armed robbery. Thus, we hold the evidence at trial was sufficient to establish beyond a reasonable doubt that defendant was accountable for the

crimes of armed robbery, felony murder, home invasion and attempt.

¶ 43 In coming to this conclusion, we reject defendant's claim that she should not be held accountable for the above crimes because she "left the scene of the crime hours before any illegal act transpired, and communicated her intent to withdraw to Orasco and Edwards." According to section 5-2(c)(3) of the Code, an individual may communicate her withdrawal from a crime in three ways: (1) by wholly depriving the group of the effectiveness of her prior efforts in furtherance of the crime; (2) giving timely warning to the proper law enforcement authorities; or (3) otherwise making proper efforts to prevent the commission of the crime. 720 ILCS 5/5-2(c)(3) (West 2010).

¶ 44 In the present case the record reveals that defendant did none of these things. While we acknowledge that defendant *allegedly*: (1) told Hill to get in contact with Orasco and Edwards and inform them that they were leaving, and (2) yelled "F this – we're leaving" out the window of her truck, these facts alone, even if accepted as true, are insufficient to establish withdrawal under section 5-2(c)(3), as neither satisfies any of the above three prongs. Moreover, we must examine these two facts within the context of Hill's testimony that defendant only decided to leave in order to avoid suspicion and get high. The record is simply devoid of any evidence showing that defendant affirmatively attempted to inhibit, prevent or deprive Orasco and Edwards from their ability to commit the above crimes. The record, however, does establish that defendant had a direct opportunity to warn the police when she was cited for cannabis. Defendant chose not to. Instead, defendant chose to pick up Orasco and Edwards the next day in her car so as to avoid police identification, accepted money and cannabis robbed/taken from Tedric, discussed fleeing Illinois and remained with Hill, Orasco and Edwards all the way up

until the police arrived at her house. These activities all signal her continuing enlistment in the plan and further prove defendant's withdrawal claim is without merit.

¶ 45 Next, defendant contends that she was deprived her constitutional right to present a defense when the circuit court denied her request to present Dr. Swann's testimony to the jury. We begin by noting that defendant did not have a constitutional right to simply present Dr. Swann's testimony. Instead, defendant only had a constitutional right to present Dr. Swann's testimony if all foundational requirements were met and the testimony was relevant and assisted defendant in establishing a defense. *Taylor v. Illinois*, 484 U.S. 400, 409 (1988). The circuit court found the proffered foundation insufficient on the grounds that Dr. Swann was not a neurosurgeon and that his testimony did not rise to the level of gross negligence or intentional malpractice. Defendant argues this finding constituted an abuse of discretion.

¶ 46 We begin by citing Illinois Rule of Evidence 702, which states:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Ill. R. Evid. 702 (eff. Jan. 1, 2011).

¶ 47 The supreme court in *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 112-13 (2004) reviewed and reaffirmed the test applicable when determining whether a physician is "qualified" to testify as an expert.

> "First, the physician must be a licensed member of the school of medicine about which he proposes to testify. [Citations.]

> Second, the expert witness must show that he is familiar with the methods, procedures, and treatments ordinarily observed by other physicians, in either the defendant physician's community or a similar community. [Citations.] Once the foundational requirements have been met, the trial court has the discretion to determine whether a physician is qualified and competent to state his opinion as an expert regarding the standard of care. [Citation.]"

¶ 48 Here, the circuit court mistakenly rejected Swann's testimony on the bases that Swann was not a neurosurgeon and that his testimony did not establish gross negligence. First, the fact that Swann was an emergency room doctor and not a neurosurgeon did not *automatically* disqualify him from testifying as a medical expert. Swann was a licensed medical doctor, thereby satisfying the first foundational requirement. " 'Whether the expert is qualified to testify is not dependent on whether he is a member of the same specialty or subspecialty but, rather, whether the allegations of negligence concern matters within his knowledge and observation.' " *Sullivan*, 209 Ill. 2d at 114 quoting *Jones v. O'Young*, 154 Ill. 2d 39, 43 (1992). Second, the issues of proximate cause and gross negligence are questions of fact for the jury. The expert need only present some evidence which assists the jury in resolving the factual questions. Both of the court's grounds for denying Swann's testimony were incorrect.

¶ 49 The above conclusion, however, does not end our inquiry. While the circuit court's reasoning was incorrect, we affirm the court's decision to bar Swann's testimony on other grounds.[1] Defendant believes she can escape liability for Terdic's death if she established that:

[1] We may affirm on any basis supported by the record. *People v. Durr*, 215 Ill. 2d 283,

(1) Dr. Jackson should have immediately performed brain surgery on Terdic, (2) the failure to perform such surgery constituted gross negligence, and (3) Terdic's death was caused by a supervening act (Dr. Jackson's gross negligence) disconnected from any act of defendant. *People v. Mars*, 2012 IL App (2d) 110695 ¶ 16-17. Defendant claims Dr. Swann's testimony establishes these facts. A review of the record, however, reveals that Dr. Swann never testified that Dr. Jackson's medical treatment of Terdic constituted gross negligence. Nor did he testify that Terdic's death resulted from gross negligence and was disconnected from the culpable act of defendant. See *People v. Gulliford*, 86 Ill. App. 3d 237, 241 (1980). Instead, Dr. Swann simply opined that Terdic's outcome might have been better had Dr. Jackson been proactive (surgery immediately) as opposed to reactive (delaying surgery).

¶ 50 We find it significant that Dr. Swann admitted that there is still controversy within the medical community as to whether surgery should be commenced immediately when treating a gunshot wound to the head. While we have already explained that gross negligence is a question of fact for the jury, we emphasize that a defendant seeking to establish such a defense must present the trier of fact with some set of facts that would allow such a conclusion to be reasonably inferred. *Mars*, 2012 IL App (2d) 110695 ¶ 21. The mere fact that Dr. Swann believed that Terdic's survival prognosis would have increased from 5% to 20% if surgery had been done immediately does not support such a conclusion. Perhaps this was the circuit court's unstated reasoning when it held that Dr. Swann's testimony did not rise to gross negligence. Simply stating, however, that such conduct did not meet such a standard implies that a question of fact exists as to whether the standard was or was not met. If this were the case, the matter

---

296 (2005).

should have been submitted to the jury. The instant case, however, does not present us with any question of fact. Dr. Swann's testimony simply cannot support a reasonable conclusion/inference of gross negligence.

¶ 51 We also note that while Dr. Swann is not *automatically* disqualified from testifying as a medical expert due to the fact he was not a neurosurgeon, a substantive review of his testimony reveals that the allegations of gross negligence in the instant case involve matters not within Dr. Swann's general knowledge and observation. *Sullivan*, 209 Ill. 2d at 114. Thus, Dr. Swann could not be relied upon to establish the applicable standard of care regarding whether surgery should have been performed immediately.[2] This conclusion is supported by the fact that when Dr. Swann is confronted with a patient suffering from a gun shot wound to the head, he calls another doctor to determine whether surgery or what type of further treatment is necessary. While Dr. Swann may initially treat the patient upon his entry to the emergency room, he does not make the decision which defendant believes was incorrectly made in the present case. Under these particular circumstances, we hold the denial of defendant's request to present Dr. Swann's testimony to the jury was correct.

¶ 52 Defendant's final claim revolves around her sentence. Defendant argues that her sentence is "excessive given the extensive evidence in mitigation." Since sentencing is within the sound discretion of the circuit court, a sentence that is within the statutory limits will not be disturbed

---

[2] Expert testimony as to such a standard of care was necessary as we do not believe a surgeon's decision whether to conduct immediate brain surgery when confronted with a gun shot wound to the head is within the common knowledge of laymen. See *Walski v. Tiesenga*, 72 Ill. 2d 249, 257 (1978).

on review unless it constitutes an abuse of discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995).

¶ 53 The aggregate sentence for felony murder (firearm included) and attempt (first degree murder firearm included) range from 56 years to 120 years' imprisonment. See 730 ILCS 5/5-4.5-20(a) (West 2010); 730 ILCS 5/5-8-1(a)(1)(d)(I) (West 2010); 720 ILCS 5/8-4(c)(1)(B) (West 2010); 730 ILCS 5/5-4.5-25 (West 2010). Defendant also faced a concurrent sentence for home invasion ranging from 6 to 30 years' imprisonment. 720 ILCS 5/12-11(2)© (West 2010); 730 ILCS 5/5-4.5-25 (West 2010). The circuit court sentenced defendant to a total of 61 years' imprisonment, which was 5 years above the minimum and 59 years below the maximum. The circuit court adequately considered the mitigating and aggravating factors, and it is not our duty to reweigh the factors involved in its sentencing decision. *Coleman*, 166 Ill. 2d at 261-62. We find no abuse of discretion.

¶ 54 For the foregoing reasons, we affirm defendant's convictions and sentences for felony murder, attempt and home invasion. Per the agreement of the parties, we vacate defendant's conviction and sentence for armed robbery (one act/one crime). See *People v. Harvey*, 211 Ill. 2d 368, 389 (2004).

¶ 55 Affirmed in part and vacated in part.